



COALEX STATE INQUIRY REPORT – 141
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TOPICS: REDUCTION OF THE MANDATORY CIVIL PENALTY

INQUIRY: Is there any caselaw to support the opinion that the mandatory \$750 per day failure to abate penalty can be reduced? If so, what are the criteria for reduction? See SMCRA Section 518(h), 30 USC 1268(h); 30 CFR 845.15(b); 30 CFR 723.15(b)(2).

SEARCH RESULTS: Research was conducted using the COALEX private library and the public materials available on LEXIS. The Interior administrative opinions and federal decisions retrieved (no relevant state cases were found on LEXIS) indicate the following:

- I. **When a violation or cessation order has not been abated within the abatement period, the assessment of \$750 for each day (up to a limit of 30 days) that failure to abate continues is mandatory and cannot be reduced.**
- II. **The civil penalty formula - the point system and conversion table - and the administrative hearing officers' ability to waive or reduce these civil penalties do not apply to the mandatory failure-to-abate civil penalties.**

The findings of the individual opinions appear below. Copies of the cases are attached.

FEDERAL CASE LAW

SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v WATT, 550 F Supp 979 (DDC 1982).

SOCM alleged that DOI officials: "failed to assess and collect mandatory civil penalties and take appropriate enforcement actions against surface coal mine operators who had been found in violation" of SMCRA.

The two issues before the court were (1) was the District Court for the District of Columbia the proper place to file the litigation; and (2) was the Secretary's duty to impose civil penalties for failure-to-abate situations mandatory or discretionary?

After determining that it had venue, the District Court ruled that the Secretary's duties under SMCRA sec. 518(h) and 30 CFR 723.15(b)(2) were mandatory:



1. These two sections use the phrase "shall be assessed". SMCRA Section 518(a) states that civil penalties "may be assessed".
2. Neither the cost of enforcement nor the likelihood of success nor the deference "for a lengthy period of time" could cause the conversion of a "mandatory duty into a discretionary one".

SAVE OUR CUMBERLAND MOUNTAINS, INC. v CLARK, 725 F2d 1434 (DC Cir 1984).

The Court of Appeals reversed SOCM v WATT on the grounds that venue in the District of Columbia was improper. While the court did not discuss the issues the Secretary raised in its appeal, it indicated in a footnote that the Secretary, in his brief, had admitted "that the duty to assess civil penalties is mandatory".

[NOTE: A copy of the subsequent history of these cases is included as an additional attachment.]

OFFICE OF HEARINGS AND APPEALS DECISIONS

PEABODY COAL CO. v OSM, 90 IBLA 186, IBLA 84-766 (1986).

The Board affirmed the Administrative Law Judge's (ALJ's) decision that "proper construction of the statute and the implementing regulations preclud[ed] the [ALJ] from reducing the statutory minimum failure-to-abate penalty."

"Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of [SMCRA] and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of \$750 per day on the basis of inability to comply."

GRAYS KNOB COAL CO. v OSM, 98 IBLA 171, IBLA 85-364 (1987).

In citing to PEABODY, the Board affirmed that it had no authority to waive or reduce a civil penalty assessed pursuant to SMCRA sec. 518(h).

"Although the Board does have the authority to waive the use of the civil penalty formula set forth at 30 CFR 723.13 and 723.14, the assessment in this case...was not the subject of the civil penalty formula."

L.W. OVERLY COAL CO. v OSM, 103 IBLA 356, IBLA 88-39 (1988).

The Board cited to PEABODY and GRAYS KNOB in making the following ruling: "In a proceeding to review the proposed assessment of a civil penalty, an Administrative Law Judge and the Board, likewise, have the authority to recalculate the assessment using the point system



and conversion table or to waive use of the civil penalty formula.... However, in addition to civil penalties assessed for violations cited in a NOV, section 518(h) of SMCRA mandates assessment of a civil penalty for the failure to abate a violation within the time allowed.... The statute and regulations, in fact, preclude the Board from waiving or reducing the statutory minimum failure-to-abate civil penalty."

APEX CO., INC., 4 IBSMA 19, IBSMA 81-53 (1982).

In an earlier decision, the Board stated: "Under 30 CFR 723.15(b), OSM is required to assess a civil penalty of not less than \$750 per day for each day during which a cessation order properly remains outstanding, up to a limit of 30 days.

GRAHAM BROTHERS COAL CO. v OSM, Docket No. CH 3-14-R (1984).

The ALJ discusses the 1982 SOCM v WATT case and subsequent history.

MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (1986).

The ALJ cited to PEABODY and ruled the "[t]he undersigned has no authority to modify this [\$750 per day for 30 days] mandatory penalty."

ATTACHMENTS

- A. SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v WATT, 550 F Supp 979 (DDC 1982).
- B. SAVE OUR CUMBERLAND MOUNTAINS, INC. v CLARK, 725 F2d 1434 (DC Cir 1984).
- C. Subsequent history: Auto-Cite and Shepard's Citations.
- D. PEABODY COAL CO. v OSM, 90 IBLA 186, IBLA 84-766 (1986).
- E. GRAYS KNOB COAL CO. v OSM, 98 IBLA 171, IBLA 85-364 (1987).
- F. L.W. OVERLY COAL CO. v OSM, 103 IBLA 356, IBLA 88-39 (1988).
- G. APEX CO., INC., 4 IBSMA 19, IBSMA 81-53 (1982).
- H. GRAHAM BROTHERS COAL CO. v OSM, Docket No. CH 3-14-R (1984).
- I. MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (1986).